



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. **78-1724**

CITRONELLE-MOBILE GATHERING, INC.,
Petitioner,

v.

GULF OIL CORPORATION and
FEDERAL ENERGY ADMINISTRATION,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI AND
ALTERNATIVE PETITION FOR A WRIT OF
MANDAMUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI AND
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APPEALS FOR THE FIFTH CIRCUIT**

Petitioner respectfully requests that this Court issue a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled action on April 20, 1979.

In the event that this Court should conclude that that order of the United States Court of Appeals for the Fifth Circuit is not appropriate for review on writ of certiorari, Petitioner respectfully requests that this Court treat this petition as one for a writ of mandamus

to direct the United States Court of Appeals for the Fifth Circuit and the Judges of the deciding panel of that Court to show cause why a writ of mandamus should not issue directing the said Court and its Judges to take jurisdiction of, hear and decide the appeal of Petitioner from the United States District Court for the Southern District of Alabama.

OPINIONS BELOW

The final order of the United States Court of Appeals for the Fifth Circuit entered April 20, 1979 is unreported, and is set out as Appendix A-1 to this petition. The prior opinion of the Court of Appeals for the Fifth Circuit is reported at 578 F.2d 1149 and is attached hereto as Appendix B. The related opinion and judgment of the Temporary Emergency Court of Appeals (TECA), entered January 23, 1979, is reported at 591 F.2d 711 and is set out as Appendix C.¹ The opinion of the District Court for the Southern District of Alabama is reported at 420 F.Supp. 162 and is attached hereto as Appendix D.

JURISDICTION

The certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The alternative mandamus jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a).

The following decisions sustain the power and jurisdiction of this Court to review the order of which re-

¹ On April 12, 1979, Citronelle-Mobile Gathering, Inc., petitioner here, filed a petition in this Court, No. 78-1562, for a writ of certiorari to TECA, to review and reverse the judgment of that Court set out in Appendix C hereto.

view is sought by Petitioner's Alternative Petition For Writ of Mandamus: *In Re Hohorst*, 150 U.S. 653 (1893), *La Buy v. Howes Leather Company, Inc., et al.*, 352 U.S. 249 (1957), *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976).

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the writ of mandamus as alternatively requested in this petition are set forth under the heading "Reasons for Granting the Writ" (*infra*, pp. 10-17).

The United States Court of Appeals for the Fifth Circuit entered its order on April 20, 1979.

QUESTIONS PRESENTED

1. May a Court of Appeals refuse to take jurisdiction of an appeal from a District Court's judgment in a diversity action, and thereby deny Petitioner the right of appellate review of important issues of constitutional interpretation and statutory construction?

2. May an appellate court refuse to follow the long-standing rule, laid down by this Court in *Louisville & Nashville Railway Co. v. Mottley*, 211 U.S. 149 (1908), that a case does not "arise under" federal law where federal law is irrelevant to plaintiff's claim, but is asserted by defendant either as defense or counterclaim?

3. Does a case "arise under" a federal law merely because that law is asserted as the basis of a defense or counterclaim to a common law claim in a diversity case?

STATUTORY PROVISIONS INVOLVED

Judicial Code, 28 U.S.C. § 1332:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

“(1) citizens of different States;”

28 U.S.C. § 1331:

“(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . .”

Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (a)(1):

“Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.”

Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note:

“§ 211. Judicial review

. . .

“(b) . . .

“(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

“(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.”

STATEMENT OF THE CASE

This is a companion case to *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., et al.*, No. 78-1562, now pending before this Court on petition for certiorari. The sole issues presented in both cases are con-

cerned with the jurisdiction of TECA and of the Court of Appeals for the Fifth Circuit, neither of which resolved any of the substantive issues of the litigation.

This case was commenced by the complaint of Petitioner, Citronelle-Mobile Gathering, Inc. (Citmoco) against Respondent, Gulf Oil Corporation (Gulf), seeking damages for Gulf's failure to pay the full contract price for a number of crude oil shipments that Citmoco sold and delivered to Gulf on and after September 1, 1975. Jurisdiction of the Federal District Court was invoked because of the diversity of citizenship of the parties.

The parties' contract had provided for Gulf's payment of prices higher than the previously controlled price, under Federal oil price controls which had lapsed on August 31, 1975. Gulf had paid the full contract price for the September 1 delivery, but for no others. Gulf admitted the contract, delivery of the crude oil shipments, payment in full for the September 1 shipment, and the failure to pay the contract price for the later shipments. Gulf also raised the affirmative defense that the Emergency Petroleum Allocation Act of 1975 (the "1975 Act") enacted September 29, 1975, retroactively reinstated the defunct price control regulation and retrospectively barred payment of the full contract price. Gulf counterclaimed for the difference between the contract price paid to Citmoco for the September 1 shipment and the lower price allegedly retroactively imposed by the later-enacted statute. Gulf invoked the provisions of § 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 754 (a)(1), as the jurisdictional basis for its counterclaim.

The Federal Energy Administration, now the Department of Energy, was permitted to intervene as a defendant.

Citmoco contended in the District Court that Congress did not re-enact the lapsed price control regulations; that neither the Congress, the President, nor the Federal Energy Administration (FEA) had thereafter effectively reinstated any price control regulations purporting retroactively to cover the month of September 1975, and that, any supposed retroactive application of price controls to previously consummated transactions would be invalid under the Due Process Clause of the Fifth Amendment. Citmoco further contended that the statutory provisions for a one-house Congressional veto of legislatively authorized Presidential regulations rendered unconstitutional the entire 1975 Act on which Gulf's affirmative defense and counterclaim depended.

The District Court found for the defendants on all issues. (Appendix D).

Citmoco appealed to the United States Court of Appeals for the Fifth Circuit. That Court, in an opinion handed down in August 1978, refused to take jurisdiction of the appeal (Appendix B). It held that the District Court had committed an interlocutory error in concluding that the due process issue raised by the Gulf counterclaim (as well as by the Complaint and answer) was not a substantial one. The Fifth Circuit held that because Gulf's counterclaim had "commenced under" the EPAA, § 211(c) of the Economic Stabilization Act, (E.S.A.) 12 U.S.C. § 1904 note, governed. That statute, partly incorporated by reference in the

Emergency Petroleum Allocation Act² provides that: "In any action commenced under this title in any district court . . . in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to [TECA]."

Ignoring the nature of Citmoco's diversity complaint, the Fifth Circuit decided that the District Court should have certified to TECA prior to judgment on any issue, pursuant to § 211(c), the single substantial issue of due process raised by the counterclaim. It withheld decision on its own jurisdiction, and remanded to the District Court with instructions to certify to TECA solely the substantial constitutional issue, raised by the counterclaim, whether the due process clause condoned retroactive application of price regulations to consummated contracts.

The Fifth Circuit neither considered nor disposed of any substantive constitutional or non-constitutional issue presented to it at that time (Appendix B). Since the Fifth Circuit's disposition was interlocutory and appeared to affect only the locus of argument rather than any other issue presented to it, Citmoco sought no review of that decision here. It did, however, unsuccessfully seek rehearing *en banc*, presciently pointing out that "the Court's decision to reject while assuming, and to assert while denying the assertion of, jurisdiction creates unnecessary problems of exceptional importance for the parties and the courts, while resolving none."

The District Court then certified the single constitutional issue to TECA. Citmoco challenged TECA's

² § 5(a)(1), 15 U.S.C. § 754(a)(1).

jurisdiction. The parties briefed the merits only of the jurisdictional and due process issues. TECA ignored the limits of the certification as well as the opinion of the Fifth Circuit. It held that it had had exclusive plenary appellate jurisdiction because, in its view, the entire case, the diversity complaint as well as the federal counterclaim, "arose under" the EPAA and hence gave exclusive appellate jurisdiction to TECA. Economic Stabilization Act § 211(a), 12 U.S.C. § 1904 note, as modified by 15 U.S.C. § 754(a)(1). Concluding that the "appeal" to it was untimely filed, TECA directed dismissal of the entire appeal (Appendix C). Petitioner has sought certiorari from this judgment; see n. 1, p. 2, *supra*.

Because TECA's seizure of plenary jurisdiction conflicted with the Fifth Circuit's earlier stated view of TECA's limited jurisdiction in this case (Appendix B) and because TECA had refused to decide the certified question, as submitted, Citmoco then moved the Fifth Circuit to reopen, reinstate and decide the appeal.³ The procedure adopted by Petitioner in the Fifth Circuit followed that used in this Court after it had certified a question of state law to a state court. See *Toll v. Moreno*, — U.S. —, 47 U.S.L.W. 4483 (April 30, 1979). Petitioner's motion suggested to the Fifth Circuit that that Court had jurisdiction to determine its own jurisdiction as well as jurisdiction to decide the case, and that the Fifth Circuit's acquiescence in TECA's decision in this diversity case was, in any event, flatly contradictory to a long and unbroken line of decisions of this Court. The Fifth Circuit thereafter entered the one-sentence order that is the subject

³ Appendix A-2.

of this Petition, denying Petitioner's motion, and refusing to assume and exercise its appellate jurisdiction (Appendix A-1).

**REASONS FOR GRANTING A WRIT OF CERTIORARI
OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS**

The decision of the United States Court of Appeals for the Fifth Circuit, set out in Appendix A-1, is a final disposition of an appeal to that Court that is appropriate for review by this Court on petition for certiorari. 28 U.S.C. § 1254(1). Should this Court conclude, however, that a petition for certiorari is not appropriate in the premises, Petitioner respectfully requests this Court to consider this petition, alternatively, as one for a writ in the nature of mandamus.

It is clear from the decisions of this Court that mandamus is the proper remedy to compel a lower Federal Court to exercise jurisdiction that it has improperly rejected. See, *e.g.*, *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976), at 352.

The reasons for granting the petition for writ of certiorari are no different from those that support a grant of the alternative petition for a writ of mandamus. Those reasons are set out below:

I.

The Order Erroneously Denying Petitioner Any Appellate Review Of The District Court Judgment. In Contradiction To This Court's Rulings, Raises Jurisdictional Issues Of Extraordinary Importance To The Business Of The Federal Courts.

Citmoco's original complaint in the District Court invoked that Court's diversity jurisdiction. Following entry of judgment against it in the District Court,

Citmoco, in due course, filed its notice of appeal in the Fifth Circuit, and the case was briefed and argued there. By its decision of August 25, 1978, the Court of Appeals for the Fifth Circuit, in practical effect, refused to decide any of the issues presented. The Fifth Circuit did not then suggest that it lacked jurisdiction to hear an appeal from the District Court's disposition of Citmoco's diversity complaint. It concluded merely that it was premature to act on the appeal because a substantial constitutional issue was raised by the counterclaim and it was incumbent on the trial court to certify that issue to TECA. The Fifth Circuit therefore withheld any disposition until that preliminary issue had been disposed of by TECA. When TECA was presented with the single certified constitutional issue raised by Gulf's counterclaim, it seized upon that limited issue as a basis for assertion of plenary jurisdiction to dispose of the entire case (Appendix C).

That TECA decision implicitly, but sharply, conflicted with the Fifth Circuit's decision of August 1978. The Fifth Circuit's decision had clearly held that only a limited aspect of the case, in its opinion, had "commenced under" the Allocation Act. TECA held, on the other hand, that the entire case had "arisen under" the Act and was subject to its plenary jurisdiction.⁴

Because TECA exceeded the scope of its limited statutory jurisdiction, as well as the scope of the Fifth Circuit's earlier indicated opinion of the limited mat-

⁴ N.B. that neither of the appellate courts considered the anomaly presented by their reliance upon the conclusion that the case had "commenced" or "arisen" under a statute, the very existence and application of which, at the time the claim arose, was one of the dispositive issues in the case.

ters open to TECA's review, Citmoco moved the Fifth Circuit to exercise its jurisdiction to consider Citmoco's diversity case appeal from the District Court's decision. *Compare, Toll v. Moreno, supra*. The challenged order of the Fifth Circuit, entered April 20, 1979, simply and summarily refused to grant Petitioner's motion, and thereby refused, without any statement of reasons, to reopen and decide Citmoco's appeal from the District Court's judgment on its diversity claim.

No appellate court has heard and decided the merits of any substantive issue raised in Citmoco's appeal.

The confusion created by the disparate views of the Fifth Circuit and of TECA concerning their respective jurisdictional limits, established by the Economic Stabilization Act as limited by the Emergency Petroleum Allocation Act and affected by this Court's decision in *Mottley*,⁵ has resulted in the failure and refusal of any court to dispose of the merits of Citmoco's appeal. That jurisdictional confusion is endemic in the federal appellate system (see pp. ¹⁴⁻¹⁵, below). It has thrown into substantial doubt not only the division of jurisdiction as between the courts of appeals of the various circuits and TECA, but the continued viability of this Court's *Mottley* doctrine.

II.

The Decision Below, Yielding To TECA Exclusive Jurisdiction To Review All Questions Decided By The Trial Court Conflicts With An Unbroken Line Of Decisions Of This Court, And With A Decision Of The United States Court Of Appeals For The Seventh Circuit.

This case was commenced by Citmoco's complaint for breach of contract, based solely on the diversity

⁵ *Louisville & Nashville R.Co. v. Mottley*, 211 U.S. 149 (1908).

jurisdiction. 28 U.S.C. § 1332. That complaint neither alleged nor implied any claim based upon a federal cause of action. Gulf's affirmative defenses and counterclaim first asserted that Citmoco's claim was barred, and the counterclaim supported, by federal price regulations.

Although the one sentence order of the Fifth Circuit, of which review is sought, provides no rationale for its disposition of the case, the nature and effect of that disposition are clear: The Fifth Circuit refused to consider or decide the merits of Citmoco's appeal and abandoned to TECA all jurisdiction of the case.

The Fifth Circuit's earlier decision implicitly conceded that there were at least some diversity issues raised by Citmoco's appeal to it and, indeed, there clearly were such issues. By its later order, challenged here, the Fifth Circuit simply refused to assume jurisdiction to hear and decide an appeal from a District Court judgment in a diversity case. Whether its laconic order be interpreted as meaning that Court deemed itself bound by TECA's decision, or that it made its own independent determination that it lacked jurisdiction in the premises, it is clear that it abandoned to TECA the jurisdiction that it had. TECA's own jurisdiction is a limited one, carved out of the general jurisdiction of the courts of appeals for the circuits. *Bray v. United States*, 423 U.S. 73 (1975), *United States v. Cooper*, 482 F.2d 1393 (TECA, 1973), *Associated General Contractors of America v. Laborers International Union*, 489 F.2d 749 (TECA, 1973); *Spinetti v. Atlantic Richfield Company*, 522 F.2d 1401 (TECA, 1975).

TECA's jurisdiction was originally created by the Economic Stabilization Act of 1970. The broadest view of its exclusive jurisdiction can extend no further than to "cases and controversies arising under" ESA (page 5, *supra*) as that statute was made applicable, in part, to petroleum price controls by the Allocation Acts (page 4, *supra*). Unless this case "arose under" the statute (but see Part III, *infra*, and n. 4, *supra*), TECA's jurisdiction, if any, could not have been exclusive, and the Court of Appeals for the Fifth Circuit retained jurisdiction to hear and decide the appeal.

The Fifth Circuit's declination of jurisdiction necessarily implies the conclusion that the entire case "arose under" the Allocation Acts. That conclusion, however, flies in the face of this Court's decision in *Louisville & Nashville R. Co. v. Mottley*, *supra*. *Mottley* laid down the rule that a case does not "arise under" federal law where, as here, the claim alleged on the face of the complaint does not require the allegation of facts that would give rise to federal law jurisdiction. It is immaterial that a federal law defense is available and raised. Indeed, in *Mottley* itself, the Plaintiffs' breach of contract complaint anticipated the defense provided by an intervening federal statute. This Court, nevertheless, held that the case did not "arise under" federal law.

The *Mottley* doctrine has been the guiding principle for "arising under" cases ever since. See, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1959), where this Court restated the rule laid down in *Mottley*. This Court more recently emphatically reiterated the continued validity of the *Mottley* rule in *Phillips Petroleum Co. v. Texaco*, 415 U.S. 125 (1974).

In *St. Mary's Hospital of East St. Louis, Inc. v. Ogilvie*, 496 F.2d 1324 (1974), the Court of Appeals for the Seventh Circuit explicitly accepted the applicability of *Mottley* to the "arising under" provision of § 211(b)(2) of the Economic Stabilization Act, which is incorporated by reference by the Allocation Act. The Seventh Circuit there held that "the phrase 'arising under' [requires] that the allegations of the complaint, not merely the answer, call for the application of the Economic Stabilization Act to the suit," 496 F.2d, at 1326. The Court of Appeals for the Fourth Circuit, without express consideration of *St. Mary's Hospital* or *Mottley*, reached an apparently contrary conclusion in its unpublished decision in *Mobil Oil Corp. v. Dominion Oil, Inc.*, (No. 78-1029, decided May 24, 1978); and the decision of the Tenth Circuit in *Mountain Fuel Supply v. R. Johnson & Johnson Oil Co.*, 586 F.2d 1375 (10th Cir. 1978), like the Fifth Circuit's original decision in this case, ambiguously suggested its unwillingness fully to follow the *Mottley* rule. The Fifth Circuit's later decision in issue here squarely contradicts *St. Mary's* application of *Mottley*.

III.

The Fifth Circuit's Refusal To Take Jurisdiction Of Citmoco's Appeal Necessarily Depended Upon A Misinterpretation Of The Controlling Jurisdictional Statute.

So far as pertinent here the jurisdiction of the circuit courts of appeals is plenary except in so far as TECA's limited jurisdiction is carved out by statute. The original statutory provision carving out TECA's limited jurisdiction was the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note. Section 211(b) of that statute removed from the other Courts of Appeals,

and granted to TECA exclusively, jurisdiction over all appeals "arising under this title or under regulations or orders issued thereunder"; and § 211(c) authorized pre-judgment certification by district courts to TECA of substantial constitutional issues in actions "commenced under this title."

Those jurisdictional provisions were carried forward with modifications and remain in effect today only by virtue of § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1).

The Fifth Circuit failed to recognize, however, that when § 5(a)(1) carried forward the jurisdictional provision of the ESA, it imposed limits upon TECA's jurisdiction that the ESA had not imposed. Unlike the ESA itself which granted TECA "exclusive jurisdiction of all appeals . . . arising under this title or under regulations or orders issued thereunder," the later-enacted Allocation Act of 1973 limited TECA's jurisdiction to cases arising only under "*the regulation promulgated under*" that statute, or under orders or actions taken under it.

This case does not involve any attack upon, or interpretation of, "the regulation promulgated," or any order or any executive action taken, under the Allocation Act of 1973. The issues presented at all stages related only to the validity and applicability of the statute itself. Citmoco conceded below, as it does here, that, if the statute retroactively re-created the regulation and if, as applied, it suffered from no constitutional infirmity, then neither the validity, nor the interpretation of the regulation is disputed.

The validity of the Fifth Circuit's refusal to take jurisdiction is dependent entirely upon the quoted statutes. Those statutes do not authorize or permit the courts of appeals for the circuits to abandon their appellate jurisdiction to TECA in cases such as this which, even assuming that it had "arisen under" the statute, certainly did not arise under the regulation.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari or in the alternative, a writ of mandamus to the United States Court of Appeals for the Fifth Circuit and reverse the disposition below to require that Court to consider and decide the issues raised by Petitioner on appeal from the United States District Court for the Southern District of Alabama.

Respectfully submitted,

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APPENDIX

1a

APPENDIX A1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3712

CITRONELLE-MOBILE GATHERING, INC., *Plaintiff-Appellant*,

versus

GULF OIL CORPORATION, *Defendant-Appellee*,
FEDERAL ENERGY ADMINISTRATION,
Defendant Intervenor-Appellee.

**Appeal from the United States District Court for the
Southern District of Alabama**

Filed April 20, 1979

Before CLARK, FAY and VANCE, *Circuit Judges*.

BY THE COURT:

IT IS ORDERED that appellant's motion to reopen, reinstate
and decide appeal is denied.

APPENDIX A2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3712

CITRONELLE-MOBILE GATHERING, INC., *Plaintiff-Appellant*,

v.

GULF OIL CORPORATION, *Defendant-Appellee*,
FEDERAL ENERGY ADMINISTRATION,
Defendant Intervenor-Appellee.

**Motion of Appellant Citronelle-Mobile Gathering, Inc.
To Reopen, Reinstate and Decide Appeal**

Appellant Citronelle-Mobile Gathering, Inc. (Citmoco) moves the Court to reopen and reinstate and, on reopening, to consider and dispose of the merits of this appeal.

On August 25, 1978, two years after the appeal to this Court was filed, this Court entered an order in this case directing the District Court to certify to TECA, for resolution, a substantial constitutional question raised by the counterclaim; 578 F.2d 1149. On November 16, 1978, the District Court issued the certificate to TECA (Appendix A). On January 23, 1979, TECA, treating the certification as if it were an appeal of an earlier judgment, dismissed the "appeal" for want of jurisdiction (Appendix B), and thereafter denied rehearing by Order of March 13, 1979 (Appendix C), thereby restoring the case to the condition it was in when this Court stayed its own hand pending the decision by TECA on the certified question. Since TECA will not answer the certified question, this Court must now

proceed to decide the merits of this controversy on the written briefs and oral arguments already submitted to it.¹

ARGUMENT

THIS COURT HAS, AND SHOULD EXERCISE, JURISDICTION
TO DETERMINE THE MERITS OF THIS CASE

I. THIS COURT HAS JURISDICTION TO DECIDE
ITS OWN JURISDICTION.

This Court, of course, has jurisdiction to determine its own jurisdiction in this case.

"'Jurisdiction to determine jurisdiction' refers to the power of a court to determine whether it has jurisdiction over the parties to and subject matter of a suit. If the jurisdiction of a federal court is questioned, the court has the power, subject to a review, to determine the jurisdictional issue." Wright, *Law of Federal Courts* § 16, at 50 (2nd ed. 1970).

This Court has previously indicated its agreement with that view; see, e.g., *Atlantic Las Olas, Inc. v. Joyner*, 466 F.2d 496 (5th Cir. 1972).

Certainly TECA's decision does not foreclose this Court's own judgment on the issue of its jurisdiction. In this very case TECA held itself not bound by this Court's judgment. In *United States v. Cooper*, 482 F.2d 1393 (T.E.C.A. 1973), at 1400, TECA took the Ninth Circuit to task for what, in TECA's view, was an erroneous decision that a case was in

¹ Because of the conflicts between the decision of TECA, on the one hand and the decisions of this Court and the Supreme Court, on the other, Citmoco will file a petition for *certiorari* to review the TECA decision; and will then request the Supreme Court to withhold its disposition of that petition to afford, so far as possible, the opportunity for this Court to consider and dispose of the issues presented here.

TECA's exclusive jurisdiction. *See also, Association of General Contractors of America v. Laborers International Union of North America*, 489 F.2d 749 (T.E.C.A. 1973); *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (T.E.C.A. 1975).

This Court has, and should assume, jurisdiction to decide the merits of this appeal.

II. TECA'S DECISION ARROGATING TO ITSELF EXCLUSIVE JURISDICTION OF THE ENTIRE CASE WAS PATENTLY ERRONEOUS.

TECA handed down its summary decision without regard to the fact that this Court's decision, TECA's own prior decisions, and overriding decisions of the Supreme Court were in sharp conflict with TECA's ruling that it had exclusive jurisdiction over all the issues in this case.

A. TECA's Jurisdictional Decision Conflicts With That Of This Court.

This Court was careful to distinguish between Citmoco's diversity complaint on the one hand, and, on the other, the counterclaim that, this Court had concluded, "commenced under" EPAA. This Court did not hold that it lacked jurisdiction of Citmoco's appeal. Rather it withheld a jurisdictional decision as to any aspect of the case pending disposition of the certified issue. It decided that the case presented substantial constitutional questions, but TECA should first have the opportunity to dispose of the single substantial constitutional issue *raised by the counterclaim*. The TECA decision conflicts with this Court's determination in so far as TECA purports to overrule the proposition that the case presented a substantial federal question requiring certification, and to disregard the distinction carefully observed by this Court between the diversity com-

plaint and the counterclaim. Only the latter was found by this Court to have "commenced under" EPAA.²

B. The TECA Decision Flatly Contradicts The Supreme Court's Decision In *Mottley* and Its Progeny.

The Supreme Court's decision in *Louisville and Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), laid down the rule that a case does not "arise under" federal law where, as here, the claim alleged on the face of the complaint itself does not require the allegation of facts that would give rise to federal jurisdiction. It is immaterial that a federal defense is available and raised. Indeed, in *Mottley* itself the plaintiffs' breach of contract complaint anticipated the defense provided by an intervening federal statute. The Supreme Court, nevertheless, held that the case did not "arise under" federal law.

The *Mottley* doctrine has been the guiding principle of "arising under" cases ever since. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *St. Mary's Hospital of East St. Louis v. Ogilvie*, 496 F.2d 1324 (7th Cir. 1974). In *Skelly*, the Supreme Court restated the rule laid down in *Mottley*. *St. Mary's* explicitly accepted the applicability of *Mottley* to the "arising under" provision of § 211(b)(2)³ of the Economic Stabilization Act of 1970, as

² Citmoco takes the position that the counterclaim, as ancillary to the diversity complaint, did not itself "commence under" the statute. It does not argue that issue here, however. Its motion seeks only to have this Court dispose, on the basis of its own prior decision and the previously submitted briefs and oral argument of the parties, of the issues that remain for decision by it.

³ 12 U.S.C. § 1904 note:

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such

amended, incorporated by reference in the EPAA. The Seventh Circuit held there that "the phrase 'arising under' [requires] that the allegations of the complaint, not merely the answer, call for the application of the Economic Stabilization Act to the suit," 496 F.2d, at 1326.⁴

TECA's decision squarely contradicts the *St. Mary's* application of *Mottley*. TECA disposed of 70 years of the Supreme Court's *Mottley* doctrine in a single sentence:

"*Mottley* was handed down in 1911 under a completely different background and context." (Slip Op., at 7).

Contrary to TECA's statement, *Mottley* was handed down in 1908 and was decided under a very similar background and context. Contrary to TECA's implication, no material facts distinguish the two cases.

In *Mottley* the plaintiffs had sued the defendant railroad for breach of the railroad's promise to furnish the plaintiffs free passes for life. The defense anticipated by the plaintiffs, and ultimately raised by the defendant, was the 1906 amendment to the Interstate Commerce Act. The [then] relatively recently enacted Interstate Commerce Act presented a background and context very similar to that of the EPAA. The Commerce Act, and its amendments to the time of *Mottley*, were designed to remedy, *inter alia*, the unrestrained pricing and rebating practices of the rail-

appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court."

⁴ TECA relied for an assertedly contrary view on an unreported 4th Circuit decision, *Mobil Oil Corporation v. Dominion Oil Company, Inc.*, No. 78-1029 (4th Cir., decided May 24, 1978) and *Mountain Fuel Supply Co. v. R. Johnson & Johnson Oil Co.*, 586 F.2d 1375 (10th Cir. 1978). Both cases began in the trial court with non-federal complaints, which were, however, disposed of at the trial court level and not appealed, so that the issues presented to the appellate court arose only out of counterclaims under EPAA.

roads. That Act contained highly detailed price control provisions. The purpose of the statute, to control and limit the pricing and other practices of the railroads, was deemed to be a matter of high national importance. The *Mottley* decision was handed down by a Supreme Court unquestionably aware of the great importance to the American economy that the Congress attributed to the statute; and it clearly understood the significance to the price control scheme created by the Commerce Act, of the continuity of controls and of the uniformity of interpretation of the statute's substantive provisions. The Supreme Court's contemporaneous decision in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), leaves no doubt about that. See also, *Houston, E.&W.T. Railway Co. v. United States*, 234 U.S. 342 (1914).

TECA did not specify, and could not have specified, any material distinction between this case and *Mottley*.⁵

⁵ TECA's conclusion that this case "clearly arises under the EPAA and is, therefore, within the jurisdiction of the TECA alone" depended upon the most flagrant kind of *post hoc* reasoning. It so "arose," that Court said, because of the "compelling interest in the 'prompt resolution of Stabilization Act questions,' . . . the question of the continuation of price controls during the period September 1-29, 1975, and the importance of assuring 'uniform interpretation of the substantive provisions of the stabilization scheme'" (Slip Op., at 8).

The logical fault is obvious in TECA's conclusion that the controversy must "arise under" the statute because it would help the statutory scheme if it did. It would have been equally sound logic for the Supreme Court to have said that *Mottley* "arose under" federal law because construction of the Interstate Commerce Act would control the litigation and "uniform interpretation of the substantive provisions" of that statute should bootstrap the case into the federal jurisdiction.

C. TECA Decided Other Controlling Jurisdictional And Substantive Issues Contrary To Statute And The Supreme Court's And Its Own Prior Decisions.

TECA incorrectly decided, *sub silentio*, and apparently unwittingly, other controlling jurisdictional and substantive issues. In so doing it overlooked or misapprehended the controlling jurisdictional statute and the significance of its own prior decisions.

1. TECA Overlooked the Fact That Its Jurisdiction, Created by the Economic Stabilization Act, But Limited by the Emergency Petroleum Allocation Act, Never Extended to this Case.

TECA correctly noted (Appendix B, at 6, 7) that the provisions of the Economic Stabilization Act of 1970 (ESA) that created its jurisdiction, 12 U.S.C.A. § 1904 note, § 211 (b), were carried forward by § 5(a)(1) of the EPAA of 1973, 15 U.S.C. § 754(a)(1). The latter statute provides, in pertinent part, that the jurisdictional provisions of the ESA

"shall apply to the regulation promulgated under § 4 (a) [of the Emergency Petroleum Allocation Act], to any order under [the EPA] Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970." (Emphasis added.)

TECA failed to recognize, however, that when § 5(a)(1) of the EPAA of 1973 carried forward the jurisdictional provisions of the ESA, it imposed limits upon TECA's jurisdiction that ESA had not imposed. Unlike the ESA itself which granted TECA "exclusive jurisdiction of all appeals . . . arising under *this title* or under regulations or orders issued thereunder," the later-enacted EPAA limited

TECA's jurisdiction only to cases arising under "*the regulation* promulgated under § 4(a)" or to orders or actions taken under the Act.

It was precisely this distinction between appellate jurisdiction of matters arising *under the statute* versus matters arising *under the regulations* or orders issued thereunder that the Supreme Court recognized in the landmark cases involving the predecessor statute of EPAA and ESA, the Emergency Price Control Act of 1942, as amended, 56 Stat. 23, 765, *et seq.* Under § 204(d) of that statute "exclusive jurisdiction to determine the validity of any *regulation or order*" was granted only to the Emergency Court of Appeals and the Supreme Court. The Supreme Court had no doubt, in interpreting that provision, that Congress meant precisely what it said; that exclusive jurisdiction to determine the validity of regulations reposed solely in the Emergency Court of Appeals and the Supreme Court, but that jurisdiction to determine issues of the validity of the *statute* was not exclusive. *Yakus v. United States*, 321 U.S. 414 (1944), at 429-431; and in *Bowles v. Willingham*, 321 U.S. 503 (1944), at 512, n.7, the Supreme Court again noted that distinction.

Here, as in those cases, the Congress must be assumed to have meant what it said. If any exclusive jurisdiction resides in TECA, it is exclusive jurisdiction to deal with issues arising under the regulation rather than under the statute.

This case does not involve any attack upon, or interpretation of, "the regulation promulgated under § 4(a)," or of any order, or any executive action taken under the EPAA. The issues presented at all stages relate only to the validity and applicability of the statute itself. *Citmoco* concedes that, if the *statute* retroactively re-created the regulation and, as applied, suffered from no constitutional infirmity, then neither the validity, nor the interpretation, of the regulation is disputed.

2. TECA Overlooked Or Misapprehended Its Own Prior Decisions In Erroneously Concluding That It Had Jurisdiction Of Matters Arising During The "Hiatus" Period.

The Gulf counterclaim, in its entirety, and Citmoco's diversity complaint, in part, related to sales made and consummated in the period September 1-29, 1975. No price control regulation was in effect when those sales were consummated. If no regulation was in effect, then the claims related to the period September 1-29 could not "arise under" the federal law which was non-existent during the period, unless the September 29 statute effectively created retroactive regulation and did so with constitutional validity.

TECA's decision apparently assumed the fact, and validity, of retroactivity without considering or deciding that issue. In so doing, it overlooked the significance of its own prior decision.

In *Pasco, Inc. v. Federal Energy Administration*, 525 F.2d 1391 (1975), TECA considered an appeal from a case unquestionably "arising under" the EPAA. The appeal was filed there on September 5, 1975, after the lapse of federal controls. TECA decided *Pasco* on October 14, 1975, some two weeks after the supposedly retroactive revival. Nevertheless, TECA pointed out in a footnote that was, however, a necessary jurisdictional holding in that case:

"Since the Allocation Act . . . expired of its own time limitations at midnight, August 31, 1975, only appeals within the saving clause of the Allocation Act, § 4(g) (1), 15 U.S.C. § 753(g) (1) (1975 Supp.), or the general saving clause, 1 U.S.C. § 109, would have been within our limited jurisdiction on September 5, 1975, when this notice of appeal was timely filed. This appeal comes within the Allocation Act's saving clause, since it provides that 'enforcement' actions, civil or criminal, pend-

ing on the Act's expiration or based upon acts committed prior to such expiration, constitute justiciable controversies which this Court may review." 525 F.2d, at 1393-1394, n. 5.

Similarly, in *Shapp v. Simon*, 523 F.2d 1404 (T.E.C.A. 1975) *reh. denied*, October 30, 1975, *cert. denied*, 424 U.S. 911 (1976), TECA dismissed an appeal as moot on September 7, 1975. The court said there:

"This controversy has now been rendered moot by the expiration of statutory authority for *the entire program of federal control and allocation of petroleum products*.

"The District Court dismissed the complaint on the ground that the plaintiff lacked standing. However on this appeal from that decision, supervening mootness prevents us from reviewing the issue of standing." (Emphasis supplied.)

Following the September 29, 1975 revival of the control program, the appellant moved for rehearing. Although TECA, of course, knew on October 30, 1975, that the control program had been revived, purportedly retroactively, it denied rehearing.

Shapp, like *Pasco*, is consistent only with the proposition that TECA, which derives its jurisdiction from the EPAA and the regulation promulgated thereunder, had concluded that the statutory foundation for that jurisdiction was lacking between September 1 and 29, 1975, and had not been revived by the September 29 statute.

In the instant case the acts complained of occurred in the very period in which TECA twice previously determined the statutory foundation for its jurisdiction was lacking. Nevertheless, it found in this case that the entire case, including specifically the counterclaim events of September 1-29, 1975, had "arisen under" the statute that was then ineffective.

III. THIS COURT SHOULD ASSUME AND EXERCISE ITS APPELLATE JURISDICTION IN THIS CASE.

This Court should now decide its jurisdiction and the merits of this appeal. This case presents important issues of statutory interpretation and constitutional construction. This Court has recognized at least one of the constitutional issues involved as "substantial." Certainly the parties are entitled to a disposition of those issues on their merits and to have that disposition without the kind of circuitous routing into, through and around the courts of the United States, that has characterized this case to date.

The consumption of time has already been inordinate, and the cost to the litigants substantial. A disposition by this Court on the merits now, would significantly reduce the future consumption of judicial time and effort, and the time, effort and money of the parties.

Respectfully submitted,

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APPENDIX B

CITRONELLE-MOBILE GATHERING, INC.,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant-Appellee,

FEDERAL ENERGY ADMINISTRATION,
Defendant Intervenor-Appellee.

No. 76-3712

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

August 25, 1978

On Appeal from the United States District Court for the Southern District of Alabama.

Before CLARK, FAY, and VANCE, *Circuit Judges.*

CLARK, Circuit Judge:

This case calls upon us to resolve questions of our appellate jurisdiction. Pleading only diversity jurisdiction under 28 U.S.C.A. § 1332, plaintiff, Citronelle-Mobile Gathering Co. [Citronelle] filed suit against Gulf Oil Co. [Gulf] for breach of a contract to buy crude oil. Gulf answered and counterclaimed for damages based upon Citronelle's willful failure to comply with the Emergency Petroleum Allocation Act of 1975 [EPAA of 1975], 15 U.S.C.A. § 753 note, and regulations promulgated pursuant to it. Gulf's counterclaim invoked the jurisdiction of the district court under diversity of citizenship and under the EPAA of 1973, 15 U.S.C.A. § 751 *et seq.*, as amended by the EPAA of 1975. The Federal Energy Administration [FEA] intervened on the side of the defendant Gulf to defend federal mandatory price and allocation regulations and rulings under EPAA of 1975. The district court ruled in favor of Gulf and FEA on all issues including the counterclaim.¹

¹ *Citronelle-Mobile Gathering Co. v. Gulf Oil Corp.*, 420 F. Supp. 162 (S.D. Ala. 1976).

Citronelle appealed to this court. Gulf and FEA assert that jurisdiction to hear this appeal lies only in the Temporary Emergency Court of Appeals [TECA], while Citronelle contends that appellate jurisdiction lies only in this circuit. For the reasons stated, we hold that decision on this question of our jurisdiction would be premature at this time and we remand the case to the district court for the submission to TECA of substantial constitutional questions involving the EPAA of 1973 and the EPAA of 1975 [collectively referred to as the Allocation Acts] and the regulations promulgated pursuant to these acts.

The dispute between the parties centers around the effect of ostensibly retroactive pricing regulations upon an installment contract made between Gulf and Citronelle, some installments of which were partially or fully performed during the hiatus between the expiration of statutory authority to regulate under the EPAA of 1973 and the restoration of regulatory authority in the EPAA of 1975, which purported to apply price regulations retroactively to cover the gap between the expiration of regulatory authority under the EPAA of 1973 and resumption of regulatory authority under the EPAA of 1975.

The parties do not dispute the material facts in this case. Citronelle buys crude oil near Mobile, Alabama, and transports it to Mobile where it stores the oil and holds it for sale. Gulf regularly buys supplies of oil from companies such as Citronelle. Prior to September 1, 1975, both Citronelle and Gulf were subject to price regulation of their crude oil sales pursuant to the EPAA of 1973, 15 U.S.C.A. § 751 *et seq.*, and Executive Order 11748, under which regulations were issued providing for the allocation and pricing of crude oil and certain other petroleum products.² Prior to

² The opinion of the district court contains a brief history and description of the regulatory scheme governing crude oil pricing. 420 F.Supp. at 165-68.

its amendment by the EPAA of 1975, the EPAA of 1973 provided that all authority conferred for the regulation of prices and allocation of crude oil would expire at midnight on August 31, 1975.

In August of 1975, Gulf contracted with Citronelle to buy all its available crude oil for \$13 per barrel beginning on September 1, 1975, the date upon which regulatory authority under the EPAA of 1973 lapsed, and continuing until any later imposition of valid controls on the price of crude oil. Pursuant to this contract, Gulf accepted crude oil deliveries from Citronelle on the following dates in 1975: September 1, 9, and 29; October 26; November 22; and December 14.

On September 29, 1975, the President signed into law the EPAA of 1975, which authorized continuation of the FEA regulations that had expired on August 31. The EPAA of 1975 stated:

It is the intent of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act.³

By the time the EPAA of 1975 became law, Gulf had received three installment deliveries from Citronelle under its

³ 15 U.S.C.A. § 753 note. The FEA administratively construed this portion of the EPAA of 1975 as mandating that price and allocations regulations of the FEA apply as though they had been in effect continuously since August 31, 1975:

Persons subject to the regulations should carry out September transactions as though the EPAA of 1975 had been enacted prior to September 1, 1975.

FEA Ruling 1975-17, Mandatory Petroleum Price and Allocation Regulations Application During September 1975, 40 Fed.Reg. 48341 (October 15, 1975).

contract and had paid for the September 1 delivery at the full contract price of \$13 per barrel. In response to Citronelle's demand for payment for the other deliveries made under the contract, Gulf contended that by the EPAA of 1975 Congress retroactively extended the regulations effective on August 31, 1975, to cover all transactions occurring during the hiatus between the August 31 expiration of regulatory authority under the EPAA of 1973 and the September 29 extension of regulatory authority under the EPAA of 1975. Application of the regulations effective on August 31, 1975, to the deliveries made by Citronelle under the contract would limit the price that Gulf could pay for the crude oil delivered to \$5.40 per barrel, instead of the \$13 per barrel specified by the contract. Thus, Gulf contended that valid retroactive FEA regulations forbade it to pay more than \$5.40 per barrel.

Citronelle filed suit for \$9,645,145, the difference between the price that Gulf agreed to pay under the contract for the six shipments and the price it was willing to pay under its interpretation of the EPAA of 1975. Gulf admitted all the material allegations of Citronelle's suit and conceded that the \$13 per barrel price was fair and reasonable. But, interposing the EPAA of 1973, as amended by the EPAA of 1975, as a defense, Gulf denied liability under the contract and counterclaimed for \$501,077.89, the net amount that it allegedly overpaid for the first delivery of September 1, for which it paid Citronelle in September, before passage of the EPAA of 1975.

Section 5(a) of the EPAA of 1973, 15 U.S.C.A. § 754(a), expressly incorporates the provisions for review found in the Economic Stabilization Act of 1970, as amended [ESA], reproduced at 12 U.S.C.A. § 1904 note. Although the ESA is no longer in effect, pursuant to Section 754, its review and civil action provisions continue to govern proceedings under the EPAA of 1973 and the EPAA of 1975. Gulf could

bring its counterclaim under the ESA's Section 210, which provides in part,

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ for an injunction . . . and/or damages.

The remaining portions of Section 210 provide for the recovery of costs and attorneys' fees for one who brings a successful action to challenge an overcharge in violation of the regulations.

The district judge heard the case without a jury. His Opinion and Order interpreted the EPAA of 1975 to mandate that regulations under the Allocation Acts be treated as having continued in force as if there had been no hiatus period. Therefore, because the contract between Gulf and Citronelle would have fallen under the regulations in effect on August 31 but for the expiration of statutory authority under the EPAA of 1973, the district court held that, by law, no installment of the contract could be performed at a cost-per-barrel agreement above the \$5.40 permitted by the regulations. Citronelle presented two constitutional challenges to the regulations: first, that retroactive application of the regulations to affect portions of an installment contract fully performed on both sides or fully performed except for the duty of the purchasing party to pay for the installment violates due process; second, that the "one House veto" provisions of the EPAA of 1973 as amended by the EPAA of 1975 violate the concept of separation of powers by according Congress an unconstitutional power to nullify rapidly the actions of the President. Finding these questions plainly without merit or foreclosed by prior decisions of the Supreme Court, the district court declined to certify them to TECA.

The review provisions of the ESA, made applicable to the Allocation Acts by 15 U.S.C.A. § 754, require the district court to certify substantial constitutional issues to TECA:

(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals.

Gulf's counterclaim, which expressly invoked the jurisdiction of the Allocation Acts, clearly constituted an "action commenced under this title," within the meaning of the statute, Section 211(c), 12 U.S.C.A. § 1904 note. This counterclaim is too closely related to the primary action to allow the cases to proceed separately, *cf.* Rules 13(a), 54(b), Fed.R.Civ.P. Therefore, we need not consider whether certification to TECA would have been a course of action required of the district court as to the principal action alone.

Gulf and the FEA assert that Citronelle can appeal the judgment of the district court only through those portions of the elaborate provisions for review set forth in the Economic Stabilization Act of 1970, as amended, 12 U.S.C.A. § 1904 note, which the EPAA of 1973 expressly incorporated in Section 5(a), 15 U.S.C.A. § 754(a), as the procedure to be followed in Allocation Acts cases. Citronelle contends that this court has jurisdiction over this appeal as we would over any final decision of a district court in a diversity case.

At the core of this dispute lies a difference in interpretation of Section 211(b)(2) of the ESA, 12 U.S.C.A. § 1904 note, which provides:

Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising

under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.⁴

The defendants assert that we should treat this appeal as one in a case or controversy "arising under" the EPAA of 1973, as amended, such that Citronelle can only challenge the district court's judgment in the TECA. They support this position by reference to the congressional purpose in establishing TECA jurisdiction: to centralize and expedite appeals raising questions of the construction or of the constitutionality of the legislation.⁵

⁴ However, Section 211(a), 12 U.S.C.A. § 1904 note, provides:

nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court.

Where a defense raises the validity of the Allocation Acts or of action taken under them, the review provisions of the ESA provide the action can be removed to a United States district court.

⁵ In 1971, Congress amended the Economic Stabilization Act of 1970 to add the provisions for judicial review that the Allocation Acts have incorporated. Senate Report No. 92-507 of the Committee on Banking, Housing, and Urban Affairs had this interpretation of the judicial review provisions in recommending them for passage:

The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program.

In order to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision, there is created a Temporary Emergency Court of Ap-

To support its position that the appeal is properly docketed here, Citronelle relies on the well-established meaning of the phrase "arising under" as a term of art in the law of federal jurisdiction. In *Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 43, 53 L.Ed. 126 (1911), the Supreme Court interpreted this test as requiring that the reviewing court examine the initial complaint filed by the plaintiff to determine whether it required federal law to state a cause of action. *Mottley* held that a case or controversy did not arise under federal law where the requisite element of federal law was stated only as a defense to the action or where the complaint merely referred to an anticipated defense.⁶

peals similar to the court established for the same purpose in the wage and price control programs of the World War II and the Korean conflict.

1971 U.S.Code Cong. & Admin.News, 92d Cong., 1st Sess., pp. 2283, 2292.

⁶ This approach finds support in the Seventh Circuit's decision in *St. Mary's Hospital, Inc. v. Ogilvie*, 496 F.2d 1324 (7th Cir. 1974), which held that the words "arising under" in the ESA review provisions should be construed as the term of art in federal jurisdiction would be construed; that is, the question should be determined from an examination of the plaintiff's complaint rather than from an examination of the issues actually presented at trial. In construing the Emergency Natural Gas Act, TECA has held that the words "arising under" as a jurisdictional grant in an analogous context "probably" conform to the meaning of the words as they appear in article III of the Constitution. *Lo-Vaca Gathering Co. v. Railroad Com'n of Texas*, 565 F.2d 144 (Em.App. 1977), cert. denied, — U.S. —, 98 S.Ct. 1245, 55 L.Ed.2d 768 (1978).

In construing the ESA review provisions, the Supreme Court has left no clue as to what view it would adopt as to the meaning of "arising under" in the context in which it appears in the case at bar. The Supreme Court has indicated a willingness to interpret the review provisions in line with discernible congressional intent. See *Bray v. United States*, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975).

We do not have to choose between these competing interpretations of the ESA to resolve the case at bar, however, because we find at a point prior to the docketing of this appeal and error by the district court which, by preventing the issues in this case from being developed in the manner contemplated by Congress, requires remand for further proceedings.

The scheme of judicial review which Congress provided for the Allocation Acts contemplates that no question of their constitutional validity or that of the regulations promulgated pursuant to them be decided by this court. In fact, Section 211(g), 12 U.S.C.A. § 1904 note, expressly provides:

The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to determine the constitutional validity of any provision of this title or of any such regulation or order

In this manner, Congress has expressly withdrawn from us jurisdiction to consider questions of the constitutionality of the Allocation Acts and regulations under them.

Consistent with this expressed intent to place the determinations of constitutionality exclusively in TECA or the Supreme Court, Section 211(c) of the ESA, 12 U.S.C.A. § 1904 note, provides:

In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the

Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

It would be improper for this court to reach the merits of the present appeal because we find that the district court erred in concluding that this case presented no substantial constitutional questions which required certification to TECA under Section 211(c). Accordingly, we must remand the case so that proper procedures may be followed.

The district court held constitutionally insubstantial the issue whether under the circumstances of this case retroactive application of the Allocation Acts regulations violated the Due Process Clause of the fifth amendment. We agree with the district court's statement of the standard for a substantial constitutional question under Section 212(g). A constitutional issue is not "substantial" if (a) it is plainly without merit, or (b) Supreme Court or TECA precedent clearly forecloses the issue raised. *Cf. Delaware Valley Apartment House Owners Ass'n v. United States*, 350 F.Supp. 1144 (E.D.Pa.1973), *aff'd* 482 F.2d 1400 (Em. App.1973). Our disagreement comes with the district court's application of this test.

In its Opinion and Order, the district court itself recognized that "no hard and fast rule has been laid down by the Supreme Court in determining when a law as applied retroactively is fair or not." Rather, the Supreme Court has looked to the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enforcement rights, and the nature of the right which the statute alters. Primarily, the district court's estimation of the importance of the entire statutory scheme to regulate crude oil prices led it

to conclude that retroactive enforcement did not violate due process:

the urgency and importance of the energy issue to the nation and its economy cannot be doubted. The public interest in maintaining continuity in the scheme of regulation is compelling in this case.

We find the district court's determination of insubstantiality in error because its retroactivity analysis focuses upon the overall importance of the Allocation Acts rather than focusing upon the specific instances of retroactive application brought into question by this case. We find a substantial constitutional question is involved in the determination of whether, under these circumstances, due process is violated where the price regulations in question are applied retroactively to cover those portions of an installment contract (1) fully performed on both sides while no regulations were in effect or (2) fully performed by the seller while no regulations were in effect and fully performed by the buyer during the same period except for payment of the sum agreed to in the contract. TECA has turned down a constitutional challenge to the power of the FEA, pursuant to regulations promulgated under the Allocation Acts, to regulate the price charged for crude oil in sales under pre-existing contracts made when no regulations were in effect. *Basin, Inc. v. FEA*, 552 F.2d 931 (Em. App.1976). But *Basin* did not decide whether the FEA may require retroactive disgorgement of the amount by which the sales price of crude oil, unregulated at the time of the completion of the installment, exceeded the price level set by regulations subsequently put into force, nor did *Basin* consider whether retroactivity violates due process where subsequently imposed regulations become effective after full completion of delivery by the seller but before the payment of the agreed-upon price by the buyer.

Nonretroactivity of the regulations under the Allocation Acts to cover contracts such as those in *Basin* would have

far more serious consequences for the statutory scheme than those likely to occur in the case at bar. Absent retroactive application in *Basin*, broad or totally open-ended contracts entered into while no regulations were in effect could serve as the springboard for massive unregulated transfers of oil. The denial of retroactivity to the comparatively small number of transactions at issue in the case at bar would have a relatively minor impact upon the scheme of regulations under the Allocation Acts. Here, denial of retroactivity will affect only those transactions where the parties completed both delivery and payment during the hiatus period or only those in which the seller fully performed his obligation to deliver and contract completion required only the payment of money by the buyer. Thus, the balancing analysis, if not the ultimate conclusion, in the case at bar will necessarily differ greatly from that in *Basin*. Therefore, we hold that the district court erred in not certifying the issue to TECA pursuant to Section 211(c), 12 U.S.C.A. § 1904 note.

Citronelle has raised other constitutional issues in the case at bar. However, it would be premature to direct certification of those issues at this time. Under the provisions of Section 211(c), 12 U.S.C.A. § 1904 note, TECA, on receipt of a certified question, may direct that the district court send it the entire case for disposition, remand the certified issue for further factual development, or give binding instructions on the certified issue and remand the case to the district court for further disposition. Depending upon TECA's determinations, the question whether to certify these remaining constitutional issues could become moot.

Because we disagree with the district court's conclusion that this case presented no substantial issues of the constitutionality of the regulations under the Allocation Acts, we remand this case to permit the district court to comply with its certification duty. By this limited exercise of our jurisdiction to determine jurisdiction, we do not intend to

intimate or suggest the answer to the question to be certified or which, if any, of its several options TECA should exercise in determining those matters over which the Allocation Acts grant it jurisdiction. *Cf. Atlantic Las Olas, Inc. v. Joyner*, 466 F.2d 496 (5th Cir. 1972). Of course, TECA is also free to determine that no substantial constitutional issues exist in this case.

The cause is remanded to the district court with directions that it certify to TECA the substantial constitutional questions raised by Gulf's counterclaim concerning due process limits upon retroactivity.

REMANDED WITH DIRECTIONS.

APPENDIX C

TEMPORALY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-31

CITRONELLE-MOBILE GATHERING, INC.,
Plaintiff-Appellant,

v.

GULF OIL CORPORATION,
Defendant/Counter-Claimant-Appellee,

and

FEDERAL ENERGY ADMINISTRATION,
Defendant-Appellee.

**Appeal from the United States District Court
for the Southern District of Alabama**

(Civil No. 75-483-P)

(Submitted: January 10, 1979 Decided: January 23, 1979)

LESTER M. BRIDGEMAN, Bridgeman & Nerenberg, Washington, D.C., with whom Louis T. Urbanczyk of the same firm; and Philip B. Kurland, Of Counsel, Chicago, Illinois, were on the brief for the Plaintiff-Appellant.

STEPHANIE LACHMAN GOLDEN, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General and C. Max Vassanelli, were on the brief for the Defendant-Appellee.

Before CARTER, ESTES and GEWIN, Judges.

Per Curiam:

All parties to this action have filed pleadings in this Court seeking dismissal of the above-styled action on the

ground that this Court lacks jurisdiction, but for "entirely different reasons."¹ The Federal Energy Administration, now Department of Energy (DOE), filed its "Memorandum in Support of Federal Defendant's Motion to Dismiss" on the ground that this Court lacks jurisdiction to review this action "since it is clear that where over two years has elapsed from entry of the final judgment and where plaintiff voluntarily withdrew an appeal it originally had filed with this Court, this Court is without jurisdiction to review any issues raised by this action at this time."² Gulf Oil Corporation (Gulf) adopted the arguments and authorities set forth in the Memorandum in Support of Federal Defendant's Motion to Dismiss.

The Court is of the opinion that the DOE's Motion to Dismiss for lack of jurisdiction should be granted.

¹ Memorandum of Citronelle-Mobile Gathering, Inc., in Response to Motion to Dismiss of the Federal Energy Administration, now the Department of Energy (DOE), p. 2:

Those reasons are that this Court did not, in 1976, and does not now, have jurisdiction. The case did not 'arise' or 'commence' under the regulation authorized by the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751, *et seq.*, (EPAA). . . .

² Memorandum in Support of Federal Defendant's Motion to Dismiss, p. 1.

Section 211(e)(2), Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note, incorporated by reference in § 5(a)(1), Emergency Petroleum Allocation Act (EPAA), as amended, 15 U.S.C. § 754, and TECA Rule 15 require a notice of appeal to be filed with the Clerk of this Court within 30 days of entry of the District Court's judgment.

See, Memorandum, *supra*, at p. 4:

Plaintiff originally did file such a notice within the requisite time. But plaintiff also knowingly chose to withdraw its appeal. Two years later plaintiff simply is precluded by its own choice, from seeking review of the district court decision in this Court.

I. FACTUAL BACKGROUND

In mid-August, 1975, Citronelle-Mobile Gathering Co. (Citmoco) and Gulf negotiated a contract which provided that beginning September 1, 1975, and until further notice (until any later imposition of price controls, according to Citmoco), Citmoco would sell and Gulf would buy crude oil at \$13 per net barrel. On September 1, 1975, Citmoco delivered and Gulf accepted 313,466.72 barrels of crude oil. Gulf was invoiced for this crude oil at the rate of \$13 per barrel on September 2, 1975 and paid the total amount of \$4,075,067.36 prior to September 29, 1975. On September 9 and 29, 1975, Gulf accepted deliveries from Citmoco of a total of 337,733.91 barrels of crude oil, for which Gulf was invoiced at the rate of \$13 per barrel. Gulf has not paid the invoice purchase price for either delivery of crude made on September 9 or 29, 1975. On October 26, November 22, and December 14, 1975, Gulf accepted delivery of a total of 691,395.3 barrels of crude oil, for which it paid Citmoco at the rate of \$5.40 per barrel.

Citmoco filed a complaint in the United States District Court for the Southern District of Alabama on October 7, 1975, seeking recovery of money damages from Gulf arising from Gulf's alleged breach of their contractual agreement. In its answer, filed October 29, 1975, Gulf asserted the affirmative defense that the Emergency Petroleum Allocation Act of 1975 (EPAA), enacted on September 29, 1975, extended the authority of the EPAA of 1973 and that the FEA regulations, 10 C.F.R. Part 212, prohibited Gulf from paying Citmoco and Citmoco from receiving \$13 per barrel for the crude sold and delivered by plaintiff to defendant in September, 1975. Gulf also asserted a counterclaim for the amount paid to Citmoco in excess of the maximum lawful regulatory ceiling price of \$5.40 per barrel (\$558,583.95).

On January 26, 1975, the FEA filed a motion to intervene as an additional party defendant in the litigation between Citmoco and Gulf in an effort to defend the regulatory

scheme directly challenged by Citmoco and the agency interpretation of the effect of Congress' retroactive extension of the EPAA on crude oil pricing practices during the period of September 1-29, 1975. The FEA's motion was granted by Judge Pittman on March 11, 1976.

The case was tried before Judge Pittman on June 8, 1976. On August 20, 1976, an opinion and order was entered granting Gulf's counterclaim in the amount of \$501,077.89 and holding that "the repromulgation of FEA's mandatory price and allocation regulations was not necessary in order to reinstate those regulations after August 31, 1975." 420 F.Supp. 162, 171 (S.D.Ala. 1976). The district court refused to certify to the TECA as a substantial constitutional question (Citmoco's assertion that the retroactive application of the regulations violates the Fifth Amendment's Due Process Clause, the judge finding that measurable unfairness in this case could not be sustained in view of the compelling public interest in maintaining continuity in the scheme of regulation.

On August 31, 1976, Citmoco filed with the District Court an Application for Stay Pending Appeal and a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. Citmoco's application for stay pending appeal was granted on September 1, 1976. On September 20, 1976, Citmoco filed a Notice of Appeal with the TECA along with a motion to postpone all procedural deadlines in the TECA pending appeal to the Fifth Circuit. This motion was denied on November 1, 1976, at which time a briefing schedule was established for all parties. On November 16, 1976, Citmoco filed a motion to dismiss its appeal with the TECA, which was granted by order of Judges Van Oosterhout, Johnson, and Jameson on December 7, 1976.

On August 25, 1978, the Fifth Circuit Court of Appeals held that the District Court's determination of insubstantiality of Citmoco's constitutional claim was in error and that a substantial constitutional question is involved when

price regulations "are applied retroactively to cover those portions of an installment contract (1) fully performed on both sides while no regulations were in effect or (2) fully performed by the seller while no regulations were in effect and fully performed by the buyer during the same period except for payment of the sum agreed to in the contract." 578 F.2d 1149, 1155 (5 Cir. 1978). Accordingly, the Court of Appeals "remanded the case to the district court with directions that it certify to TECA the substantial constitutional questions raised by Gulf's counterclaim concerning due process limits upon retroactivity." *Citronelle, supra*, at 1156.

On August 28, 1978, the District Court certified the question to the TECA, pursuant to the Fifth Circuit Court of Appeals' direction. Citmoco's motion of September 6, 1978, to postpone procedural dates until November 10, 1978, or until 30 days after the United States Court of Appeals for the Fifth Circuit disposed of Citmoco's petition for rehearing in that court, whichever occurred last, was granted on September 12, 1978. Citmoco also sought, on September 6, 1978, vacation of the District Court's order certifying the cause to the TECA since the Fifth Circuit's mandate had not yet been issued and premature certification to the TECA was causing procedural problems before both courts. This motion was granted by the District Court on September 12, 1978. Citmoco's motion for rehearing and rehearing en banc before the Fifth Circuit was denied on October 20, 1978.

On November 16, 1978, District Judge Pittman entered his "Order Certifying Cause to the Temporary Emergency Court of Appeals," which was filed in TECA on November 22, 1978.

On November 21, 1978, the DOE moved to dismiss the action pursuant to TECA Rules 25(c) and 26 for lack of jurisdiction. The DOE argues that "where over two years have elapsed from entry of final judgment and where plain-

tiff voluntarily withdrew an appeal it originally had filed with this Court, this Court is without jurisdiction to review any issues raised by this action at this time." Memorandum in Support of Federal Defendant's Motion to Dismiss, p. 1. On November 30, 1978, Citmoco filed a motion to dismiss on the ground that "[t]his case did not 'arise' or 'commence' under the regulation authorized by the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751, *et seq.*, (EPAA) and hence, this case, in all its aspects, falls entirely outside the scope of this Court's limited jurisdiction." Memorandum of Citronelle-Mobile Gathering, Inc., in Response to Motion to Dismiss, p. 2.

II. JURISDICTION

In creating the Temporary Emergency Court of Appeals, Congress gave the Court "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." § 211(b)(2), Economic Stabilization Act of 1970 (ESA), 12 U.S.C. 1904 note (1977 supp.). Section 5(a)(1), Emergency Petroleum Allocation Act (EPAA), as amended, 15 U.S.C. § 754, carries forward this grant of special jurisdiction:

... [S]ections 209 through 211 of the Economic Stabilization Act of 1970 . . . shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970.

Plaintiff-appellant, Citmoco, has consistently characterized this case as merely involving a breach of contract and, therefore, as beyond the jurisdiction of this Court. Citmoco relies extensively on the Supreme Court decision in *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1911), for the propo-

sition that a case or controversy does not arise under the federal law where, as here, the required element of federal law is stated as a defense to the action. Citmoco does not dispute the fact that Gulf's counterclaim arises under the EPAA, but instead maintains that the presence of a federal question in the counterclaim is insufficient to invoke the jurisdiction of this Court. *Mottley* was handed down in 1911 under a completely different background and context.³

In *Mobil Oil Corp. v. Dominion Oil Co. Inc. and James R. Schlesinger*, No. 70-1029 (4 Cir. 1978), a diversity suit brought by Mobil for the balance of a note, the defendant raised two counterclaims, one of which asserted that Mobil had failed to comply with certain orders of the FEA. The Court of Appeals dismissed the appeal for lack of jurisdiction, relying on Congress' grant of exclusive jurisdiction to the TECA in § 211(b)(2), ESA and § 5(a), EPAA. In another case presenting a similar issue by way of a counterclaim, *Mountain Fuel Supply Co. v. R. Johnson and Johnson Oil Co.*, Nos. 77-1410, 77-1432 (10 Cir. 1978), the Court of Appeals for the Tenth Circuit determined that federal question jurisdiction did in fact exist and that jurisdiction was vested in the TECA, despite plaintiff's characterization of the suit as one based on breach of contract:

We have previously noted that the issues tried in this case were those framed by the Johnson Counterclaim.

³ The Emergency Petroleum Allocation Act of 1973 was enacted . . . against a background of severe shortage of crude oil and its products. The principal aims of the Act were to meet the nation's priority petroleum needs, to distribute the remaining available products equitably, and at equitable prices. . . .

House Report No. 94-340, quoted in *Mapco, Inc. v. Carter et al*, 573 F.2d 1268, 1276 (TECA 1978), *cert. denied*, 98 S.Ct. 3090 (1978). See also, *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA 1975), *cert. denied*, 421 U.S. 976 (1975); *Basin, Inc. v. FEA*, 552 F.2d 931 (TECA 1977); *Mobil Oil Corp. v. FEA*, 566 F.2d 87 (TECA 1977).

The allegations set forth in that counterclaim invoked and implicated United States laws under the ESA of 1970, 12 U.S.C.A. § 1904 Note (Supp. 77); the EPAA of 1973, 15 U.S.C.A. §§ 751 *et seq.*, and the implementing regulations duly promulgated thereunder. 6 CFR § 150.353 (1974); 10 CFR § 211.63(a) (1977).

Gulf's counterclaim clearly arises under the EPAA and is so closely related to Citmoco's complaint that the resolution of the litigation in its entirety requires application and interpretation of the EPAA of 1973, as amended September 29, 1975. Just as the Court of Appeals for the Second Circuit recognized in *M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp.*, 531 F.2d 669, 671 (1976), that "construction of the EPAA . . . will control the litigation," the determination of the proper price for the crude oil in this case depends on the retroactive application *vel non* of the EPAA amendments.

Given the compelling interest in the "prompt resolution of Stabilization Act questions," *Bray v. U.S.*, 423 U.S. 73, (1975), here, the question of the continuation of price controls during the period of September 1-29, 1975, and the importance of assuring "uniform interpretation of the substantive provisions of the stabilization scheme," *Bray, supra*, at 75, this controversy clearly arises under the EPAA and is, therefore, within the jurisdiction of the TECA alone. The determination by the Fifth Circuit Court of Appeals that the District Court had not followed the proper certification procedure and had "erred in concluding that this case presented no substantial constitutional questions which required certification to TECA under section 211(c)," *Citronelle, supra*, at 1154, was an assertion of jurisdiction which it did not have.

This Court's decision in *United States v. Cooper*, 482 F.2d 1393 (1973), thus mandates dismissal of this appeal. Because the Fifth Circuit Court of Appeals had no juris-

diction to order the District Court to certify as a substantial constitutional question the issue of the retroactive application of the regulations under the EPAA of 1973, the certification cannot be treated as a valid notice of appeal. As this court noted in *Cooper, supra*, at 1400, the filing of a timely notice of appeal is mandatory and jurisdictional. See *United States v. Robinson*, 361 U.S. 220 (1960). Final judgment was entered in this case on August 20, 1976. Citmoco filed a timely notice of appeal with the TECA on September 20, 1976, as required by TECA Rule 15 and § 211(c)(2), ESA. However, asserting that jurisdiction lay in the Court of Appeals for the Fifth Circuit and not in TECA, Citmoco, on November 1, 1976, moved to voluntarily withdraw its appeal and was granted leave to do so on December 7, 1976.

Contrary to Citmoco's assertion, the TECA had exclusive jurisdiction over the subject matter of this litigation when the original notice of appeal was filed. This Court's jurisdiction terminated upon Citmoco's voluntary withdrawal of its appeal, and it does not now have jurisdiction. Citmoco knowingly elected to pursue its appeal in the Fifth Circuit Court of Appeals and take the consequences.⁴ Citmoco's Memorandum in Support of Motion for Leave to Withdraw Appeal, page 3, stated:

Appellant . . . believes under the circumstances that it is entitled to pursue this litigation in an orderly manner and as in its judgment it best sees fit, taking cognizance of the risk of an adverse determination by the

⁴Substitution of the words "certification" and "on certification" in the record (Appendix) and other papers filed in this Court for the word "appeal" in those filed in the Fifth Circuit Court of Appeals cannot render torpid the expedited appellate process provided by Congress for controversies so obviously controlled by the mandatory pricing and allocation laws and regulations involved in this case. See *Bray v. United States*, 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975).

Fifth Circuit without further recourse to invoke the jurisdiction of this Court.

IT IS ORDERED AND ADJUDGED that this action be and hereby is DISMISSED for want of jurisdiction.

APPENDIX D

Opinion and Order

(Filed and Entered August 20, 1976)

The plaintiff is Citronelle-Mobile Gathering, Inc. (Citmoco), a corporation organized and existing under the laws of the State of Delaware and with its principal place of business in Mobile, Alabama. Citmoco is engaged in business in this district of the purchase of crude oil from the Citronelle field, Citronelle, Mobile County, Alabama. It also transports such crude oil to a terminal in Mobile, Alabama, for storage and resale on tidewater in Mobile.

The defendant Gulf Oil Corporation (Gulf) is a corporation organized and existing under the laws of Pennsylvania with its principal place of business in Pittsburgh. Gulf is engaged in the business of producing, refining, and selling crude oil and petroleum products. Gulf is qualified to do, and is doing, business in Mobile, Alabama. The jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. § 1332(a). The complaint alleges an amount in controversy exceeding \$10,000 exclusive of interest and costs. The venue is in this district pursuant to 28 U.S.C. § 1391(a), § 1392(e), and § 1393.

Citmoco proceeds on three cause of action. First, they seek damages in the amount of \$4,390,540.83 for an alleged breach of contract by Gulf with Citmoco for the purchase of crude oil. Citmoco sold 337,734 net barrels of Citronelle crude oil to Gulf at Mobile, Alabama, at an agreed price of \$13.00 a barrel on September 9, and September 29, 1975. Citronelle claims Gulf on September 30, 1975, repudiated that contract and refused to pay Citmoco more than \$5.40 a barrel on Citronelle crude.

In the second cause of action Citmoco claims that during the period of September 29 to December 21, 1975, it sold 691,395.3 additional net barrels of crude oil to Gulf under the terms of an agreement for \$13.00 a barrel, but that

Gulf paid instead \$5.40 per net barrel. Citmoco seeks recovery of the difference between the \$5.40 and \$13.00 a barrel.

Gulf claims that the recovery sought by Citmoco in all three causes of action is barred by the Emergency Petroleum Allocation Act of 1975 (EPAA), P.L. 94-99, Federal Energy Administration (FEA) Regulations 10 C.F.R., Part 212 and FEA Ruling 1975-17.

Gulf has filed a counter-claim in the amount of \$558,583.95 for a September 1, 1975, purchase for which Gulf paid Citmoco \$13.00 per barrel. Under the above regulations Gulf claims a refund which represents a difference between the regulated price of \$5.40 per barrel and the paid price of \$13.00 per barrel. They have demanded and been refused the refund by Citmoco.

Gulf invokes jurisdiction of this court pursuant to 15 U.S.C. § 754 as amended by P.L. 94-99 and 28 U.S.C. § 1332 (a). Gulf contends that FEA Regulation 10 C.F.R., Part 212, prohibits Gulf from paying Citmoco more than \$5.40 per barrel. Venue is claimed in accordance with 28 U.S.C. § 1391.

The Federal Energy Administration (FEA) was permitted to intervene as Intervenor-defendant. FEA took no position with respect to the total amounts of oil delivered, the total amount paid, or the total claimed in an alleged overpayment by Gulf. FEA is an agency and instrumentality of the United States under the Federal Energy Administration Act of 1974, 15 U.S.C., § 761, *et seq.*, and was established by Executive Order 11790, June 27, 1974.

FEA contends there was a valid ceiling price of \$5.40 during the period set out in the complaint and counter-claim. It also contends that if there were "substantial constitutional issues" during the September 1-29, 1975, period, thus court is bound to certify the issues to the Temporary Emergency Court of Appeals (TECA). FEA further con-

tends that if there are no substantial constitutional issues, the sales of "old" crude oil could not exceed the Agency's maximum lawful ceiling price of \$5.40 per barrel.

FINDINGS OF FACT

During the period when the nation's energy policy was being hotly debated and before the Regulations expired on August 31, 1975, Citmoco and Gulf entered into an agreement providing that effective September 1, 1975, and until any later imposition of valid price controls on the sale of crude oil, Citmoco would sell, and Gulf would purchase, any and all Citronelle crude that Citmoco had available for resale at Mobile, at \$13.00 per barrel. On September 1, 1975, Gulf purchased and accepted delivery from plaintiff of 313,466.72 barrels of Citronelle crude. On September 2, 1975, Gulf was invoiced for this crude oil at the rate of \$13.00 per barrel for a total amount of \$4,075,067.36, which amount was paid to Citmoco prior to September 29, 1975. On September 9 and 29, 1975, Citmoco sold and delivered to Gulf a total of 337,733.91 barrels of Citronelle crude for which Citmoco invoiced Gulf at the agreed rate of \$13.00 per barrel. Gulf has not paid Citmoco the invoiced purchase price for the September 9 and 29 delivery of crude oil. On October 26, November 22, and December 14, 1975, Citmoco sold and delivered to Gulf a total of 691,395.3 barrels of Citronelle crude oil for which Gulf paid Citmoco at the rate of \$5.40 per barrel.

As of September 29, 1975, the date of the enactment of EPAA of 1975, Gulf had not paid Citmoco the charges invoiced to Gulf for the September 9 and September 29 purchases of crude oil. Gulf thereafter notified Citmoco that it could not pay such invoices, asserting that it was prohibited by reason of the enactment of EPAA of 1975. Citmoco is also claiming the difference between the \$5.40 paid and the agreed \$13.00 per barrel as a balance due for the October, November, and December 1975 deliveries. This would be a valid claim based on an agreed price if there were not valid

regulations of the price of crude oil at a lesser price. Citmoco claims there were no effective price controls during this period.

Gulf claims it is prohibited by law from paying more than the EPAA ceiling of \$5.40 per barrel, and has filed a counter-claim for the excess over \$5.40 per barrel paid to Citmoco for the September 1, 1975 purchase. It claims the EPAA regulation is retroactive.

CONCLUSIONS OF LAW

Plaintiff asserts jurisdiction pursuant to the provisions of Title 28 U.S.C. § 1332(a).

This court has jurisdiction of defendant Gulf's counter-claim under Section 210 of the Economic Stabilization Act of 1970, as amended 12 U.S.C. § 1904, and as incorporated into the Emergency Petroleum Allocation Act of 1973, as amended by P.L. 94-99, 15 U.S.C. § 751, et seq., which incorporated Federal Energy Administration, 10 C.F.R. Part 212.

Venue is properly laid in this district under 28 U.S.C. § 1391 and § 1393. Under § 210(a) of the Economic Stabilization Act:

"Any person suffering legal wrong because of any act or practice arising out of [EPAA of 1973, as amended] . . . or any order or regulation issued pursuant thereto, may bring an action in the District Court of the United States, without regard to the amount in controversy for appropriate relief . . . and/or damages."

The Emergency Petroleum Allocation Act of 1975 reinstated FEA price control (10 C.F.R., Part 212) retroactive to September 1, 1975.

FEA has been delegated all authority under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751, et seq., as recently amended by the Energy Policy and Conservation Act, 42 U.S.C. § 754, to promulgate and enforce

price regulations relating to petroleum and petroleum products. The authority to regulate the prices of petroleum and petroleum products was formerly exercised by the Cost of Living Council (COLC) pursuant to duly delegated authority under the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904, note.

Pursuant to the Economic Stabilization Act, Executive Orders issued pursuant thereto, and various delegations of authority, the COLC promulgated "Phase IV Price Regulations" relating to petroleum and petroleum products, shown as 6 C.F.R. Part 150, Subpart L., § 150.351, *et seq.*, (promulgated 38 F.R. 22536, August 22, 1973, as amended 38 F.R. 23794, September 4, 1973).

Pursuant to the EPAA and the delegations of authority contained in Executive Order 11790, the COLC price regulations relating to petroleum and petroleum products were re-enacted in substance by the FEA at 10 C.F.R. Part 212, subpart D, § 212.91, et seq. (39 F.R. 1924, et seq., January 15, 1974). The President was authorized by Section 4(a) of the EPAA of 1973 to promulgate a "regulation providing for the mandatory allocation of crude oil and refined petroleum products in amounts specified in . . . and at prices specified in . . . such regulation." 15 U.S.C. § 754(a).

Under FEA price regulations pertaining to the pricing of crude oil, a two-tier pricing system was adopted. Under the two-tier pricing system, the Regulations prescribed a ceiling price on domestic crude oil produced from a given property when production is at or below the level of production from the same property in the same month of 1972 ("old" crude). Crude oil produced in excess of 1972 production levels from the same property ("new" crude) was exempt from price controls and could be sold at an uncontrolled or free market price. During the period January 15, 1974, through August 31, 1975, the ceiling price for old oil sold by Citmoco to Gulf was \$5.40 per barrel.

The Regulations in effect on August 31, 1975 (10 C.F.R. § 212.10), provided that no firm or person could charge or knowingly pay a price for crude oil which exceeded the price permitted by the Regulations, and that firms or persons which violate the Regulations would be subject to civil or criminal penalties, as well as private suits for damages. Both Citmoco and Gulf were subject to the price controls of the Regulations as the same applied to the purchase and sale of domestic crude.

Since its original passage, the Allocation Act has been extended on four occasions: P.L. 93-511 (December 5, 1974); P.L. 94-99 (September 29, 1975); P.L. 94-133 (November 14, 1975); P.L. 94-163 (December 22, 1975). The statutory authorization for price control under the EPAA of 1973, as extended, expired on August 31, 1975.

Sales of Citronelle crude oil made by Citmoco to Gulf were subject to such price controls during the months of September, October, November, and December, 1975.

Citmoco's demand for payment in excess of the lawful ceiling price permitted by FEA's mandatory price regulations should be denied with respect to the above transactions. Citmoco is not entitled to the contract price of \$13.00 per barrel for crude oil sold to Gulf to the extent it is inconsistent with FEA regulations.

Section (a) of 15 U.S.C. § 753, provided that

"[t]he President shall promulgate a regulation providing for the mandatory allocation of crude oil . . . in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation . . . [s]uch regulations shall apply to all crude oil . . . produced in or imported into the United States."

Section (g)(1), 15 U.S.C. § 753, of the EPAA of 1973, as amended February 28, 1975, provided in pertinent part that:

"The regulation promulgated and made effective under subsection (a) of this section shall remain in effect until midnight August 31, 1975, except that . . . the President may exempt crude oil . . . from such regulation in accordance with paragraph (2) of this subsection."

Paragraph (2) of the subsection, 15 U.S.C. § 753(g)(2), provided that, if the President found application to crude oil of the regulation authorized by subsection (a) unnecessary to carry out the ends of the EPAA of 1973, he might exempt such oil from regulation for a period of not more than 90 days, subject to the opportunity for prior Congressional disapproval of the Executive Action.

Congress enacted legislation, S. 1849, on July 31, 1975, on a substitute bill which would have extended the price control regulation until March 1, 1976, upon the expiration of the price controls August 31, 1975. This bill was forwarded to the President on August 28, 1975, and was vetoed September 9, 1975. Therefore, the price controls without future action would have expired August 31.

During 1975, Congress, the President, and the public were engaged in a well-publicized debate on the future direction of national energy policy. During the course of the legislative process, the Emergency Petroleum Allocation Act of 1973 expired and was extended on two occasions. There is no doubt and this court so finds, that Congress was acutely aware that there was the possibility of a gap between expiration and reinstatement of the price control law and regulations, therefore, any extension of the EPAA was intended to apply retroactively to August 31, 1975. There is no doubt that the public as a whole and the oil industry in particular was well apprised of the ongoing applicability of the Regulations during any "hiatus" period between the lapse of the Regulations on August 31, 1975, and the inactment of an extension. Statements by the FEA on August 25 (see attachment "C" to Defendant FEA's memorandum

in support of its Motion for Summary Judgment, Doc. No. 35), and a press release dated September 29, 1975, (see attachment "D" to Defendant FEA's memorandum in support of its Motion for Summary Judgment) make it clear that any extension was to apply the Regulations retroactively in order that there be no gap in their coverage. Both Gulf and Citmoco are highly sophisticated corporations with many years experience in the petroleum industry. There is little doubt that the intent of Congress and the FEA as to the retroactive application of any extension of the Regulations was fully known and appreciated by both.

The Regulations lapsed on August 31, 1975, and they were not extended until September 29, 1975, by P.L. 94-99. The statutory language indicates that the extension was intended to apply retroactively to September 1, 1975, covering any hiatus in the application of the Regulations to transactions taking place during that time period.

In that public debate, as in the President's veto message of the August 28 bill, it was clear that the President was committed to removing the ceiling on price controlled domestic oil. It was equally clear that Congress was committed to the extension of price controls.

In September 1975, Congress passed the Emergency Petroleum Allocation Act of 1975 which the President signed on September 29, 1975, more than four weeks after the expiration of the 1973 Act. The statute is as follows:

"AN ACT TO EXTEND THE EMERGENCY PETROLEUM ALLOCATION ACT OF 1973.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title

Section 1. This Act may be cited as the "Emergency Petroleum Allocation Act of 1975".

Extension of Mandatory Allocation Program

Sec. 2. Section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out 'August 31, 1975', wherever it appear and inserting in lieu thereof 'November 15, 1975.'

Sec. 3. *It is the intent* of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975 and the date of enactment of this Act.

Sec. 4. The purpose of this limited extension of the Emergency Petroleum Allocation Act is to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy. During the period of this extension it is the *intent of the Congress that the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy* under Section 4(g)(2) of the Act prior to November 1, 1975. Any adjustment the President may make in price shall be in accord with his policy on inflation impact statements and economic justification set forth in Executive Order Numbered 11821 and in Circular Numbered A-107, January 28, 1975, Office of Management and Budget.

Sec. 5. Any *Senate resolution to disapprove a Presidential decontrol* proposal submitted under section 4 (g)(2) shall be immediately placed upon the Senate legislative calendar and any motion by the Majority Leader or his designee thereafter to proceed to the consideration of such disapproval resolution shall be decided without debate and by a majority vote; and within forty-eight hours after the disapproval resolution is made the pending business or sooner if otherwise ordered by the Senate, the Chair shall direct the Clerk to call the roll on the final disposition of the

disapproval resolution without any further debate or intervening motion, any other rule or provision of law notwithstanding." (Emphasis added) .

The plaintiff argues that the expression in the Act of the intent of Congress expressed only the desire of Congress that the President reissue the regulations. They further argued that this was consciously restricted to such a desire by previous use of the language in other regulations. It is contended that had Congress intended to make the regulations referred to adopted by this statute, they would have expressly said so as they did in the Emergency Price Control Act of 1942, 50 U.S.C.A., Appendix 901(b) by the Price Control Extension Act of 1946 (PCEA), 50 U.S.C.A., Appendix 901(z).

The objective of the court in a case calling for construction of a statute is to ascertain the Congressional intent and give effect to legislative will.

Although the language is not as express or clear as it was in the PCEA of 1946, considering the circumstances of the debate and the contest of wills between the President and Congress, it is abundantly clear to this court that Congress intended to adopt the regulations as part of the Act as if they had used the same language as that which they used in the PCEA of 1946.

To hold that Section 5, which provided for a Senate resolution to disapprove any Presidential decontrol proposal expressed an intent of Congress that their language in previous sections was only advisory to the President would emasculate those mandatory expressions of intent and which to this court seems abundantly clear. The court interprets this provision as an announcement to the President that Congress would not permit any decontrol and provided a means to rapidly nullify such action should he attempt such decontrol.

The plaintiff attempts to raise constitutional issues, to wit, whether the Government may retroactively amend the terms of a private contract and that Section 5 of the Act provides for a legislative veto in violation of the President's executive action, a violation of the separation of powers provided by the first three articles of the Constitution. It is further contended that the retroactive application of the regulations violates the due process clause of the Fifth Amendment.

If there are substantial constitutional questions involved, the Temporary Emergency Court of Appeals (TECA) is the proper forum. 12 U.S.C. § 1904, note.

Only "substantial" constitutional issues are subject to certification by a district court to the TECA. A constitutional issue is not "substantial" if (a) it is plainly without merit, or (b) if Supreme Court or TECA precedent exists to foreclose the subject raised. *National Petroleum Refiners Association, et al. v. Dunlop, et al.*, 486 F.2d 1388 (Em. App. 1973); *Delaware Valley Apartment House Owners Ass'n. v. United States*, 350 F.Supp. 144 (E.D. Pa. 1973), aff'd, 482 F.2d 1400 (Em. App. 1973).

The Supreme Court has upheld the authority of the federal government to enact legislation affecting previously acquired contract rights of individuals. *Louisville & Nashville Railroad v. Mottley*, 219 U.S. 467 (1911); *Norman v. B. & O. R. Co.*, 294 U.S. 240 (1935).¹ The September 1, 1975 sales transaction between the parties which was completed at the \$13.00 per barrel price is subject to being conformed to the regulations without violating any constitu-

¹ As stated in *Norman*, supra:

"[T]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, when they interfere with carrying out the policy it is free to adopt."

tional prohibition. In *Howell Electric Motors Co. v. United States*, 172 F.2d 953, 954 (6th Cir. 1949), the court stated:

"It is settled law that the retroactive reach of a statute may constitutionally cover property rights that have vested . . . and also may cover payments already received."

As to the sales occurring after September 29, 1975, *Basin Inc. v. Federal Energy Administration, et al.*, . . . F.2d . . . (Em App. No. 5-14, April 6, 1976), held that future sales under pre-existing contracts could validly be precluded.²

Section 3 of the EPAA of 1975 directly expresses the intent of Congress that said statute is non-penal and Citmoco faces no possible consequences from the FEA which can be deemed criminal in nature. This court finds that Citmoco's allegation that the subject legislation violates the Ex Post Facto Clause of the United States Constitution is not well taken. The Supreme Court in *Calder v. Bull*, 3 U.S. 385 (1898), laid down the basic principal that both of the Ex Post Facto Clauses only affect laws that are criminal in nature. *Calder, supra*, is the leading authority on the question and has been followed by practically all the courts.

Citmoco's allegation that the retroactive application of the regulations, as extended by the September 29, 1975 extension, contravenes the Fifth Amendment's Due Process Clause is without merit and therefore does not rise to the level of being "substantial" in order that the issues be certified to the TECA. The due process clause invalidates only those statutes whose retroactivity results in measurable unfairness. *Porter v. Senderowitz*, 158 F.2d 435, cert. den.,

² The court stated:

"By the same token, sales made after the Allocation Act of September 29, 1975, are not beyond the reach of that legislation merely because they occur in performance of agreements entered into before September 29." At p. 3.

67 S. Ct. 1091 (C.C.A. Pa., 1947). Although no hard and fast rule has been laid down by the Supreme Court in determining when a law as applied retroactively is fair or not there are three major factors which are to be considered.³ These factors are: the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enactment right, and the nature of the right which the statute alters.

As found by this court, the urgency and importance of the energy issue to the nation and its economy can not be doubted. The public interest in maintaining continuity in the scheme of regulation is compelling in this case. A review of the legislative history of the passage of the September and November 1975 statutes which extended the EPAA of 1973 demonstrates the temporary emergency nature of the situation, the strength of the public interest involved, and the full extent of pre-enactment notice. It seems the plaintiff cannot claim unfairness or surprise. This court concludes that the EPAA of 1975 meets the test of fundamental fairness and there is supportive case law. It is a valid retroactive statute and such retroactivity does not rise to the standard required to be "substantial" requiring certification.

The Government agrees with the contention that Section 5 is a Congressional veto of Presidential authority raises a substantial constitutional question but asserts that the plaintiff has no standing to raise this question. This court agrees.

The Government further contends that if it is assumed that FEA should have repromulgated its recommendations after enactment of EPAA of 1975, the agency could have waived the 30 day notice, etc., as required by the Administrative Procedure Act premised upon a "good cause" basis.

³ See Hoekman, "The Supreme Court and Constitutionality of Retroactive Legislation", 73 Harvard Law Rev. 692 (1960).

No real purpose would have been served by requiring the redundant solicitation of public comment. This had already been previously accorded for exactly the same regulation in question. The pricing provisions under consideration are part of a comprehensive regulatory system of price and allocation control which evolved over a 2½ year period which had been carefully promulgated consistent with the standards of administrative due process including notice and opportunity to comment. Repromulgation would have required the administrative procedures be once more employed, necessitating delay and a lapse in regulatory enforcement. This would have served no useful purpose. The court considers this is not a substantial constitutional question which should be certified to the TECA.

Congress was undoubtedly aware of the delay which would have been occasioned by a republication of the regulations. This is buttressed by this court's construction that Congress intended by the language of the Act to incorporate the provisions of the regulations in the EPAA of 1975.

The court therefore finds that the EPAA of 1975 effectively reinstated FEA's mandatory price and allocation regulations by passage of the Act and intended them to be retroactively applied to the period between August 31, 1975 and September 29, 1975, the date on which the law was extended by P.L. 94-99.

It is held that the repromulgation of FEA's mandatory price and allocation regulations was not necessary in order to reinstate those regulations after August 31, 1975.

The defendant-counterclaimant is permitted to pay no more than \$5.40 per barrel for each barrel of "old" crude oil during the months of September, October, November, and December, 1975. The defendant-counterclaimant is entitled to a refund in the amount of \$501,077.89, which amount has been agreed upon in the event the court finds as it has in this case.

It is therefore ORDERED, ADJUDGED, and DECREED that the defendant-counterclaimant Gulf Oil Corporation have and recover on its counter-claim against the defendant Citronelle-Mobile Gathering, Inc., \$501,077.89 together with costs, and for the defendant Gulf on the plaintiff's claim.

Done, this the 20th day of August, 1976.

VIRGIL PITTMAN

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 75-483-P

CITRONELLE-MOBILE GATHERING, INC., *Plaintiff*,

v.

GULF OIL CORPORATION, *Defendant/Counterclaimant*,

and

FEDERAL ENERGY ADMINISTRATION, *Defendant*.

Judgment

(Filed and Entered August 20, 1976)

The court having heretofore entered its Findings of Fact and Conclusions of Law in favor of the defendant/counter-claimant and against the plaintiff, Citronelle-Mobile Gathering, Inc.;

It is Ordered, Adjudged, and Decreed that the defendant/counter-claimant, Gulf Oil Corporation do have and recover on its counter-claim against defendant Citronelle-Mobile Gathering, Inc., \$501,077.89 together with costs, and for defendant Gulf on plaintiff's claim.

Done, this the 20th day of August, 1976.

VIRGIL PITTMAN
United States District Judge